

Attendance Management

A guide to best practices on
current issues

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Topics to be Addressed

- Attendance management policies
- Doctors' notes and visits
- Chronic absenteeism
- Disability and accommodation
- Dealing with the aging workforce
- The decision to dismiss

ATTENDANCE MANAGEMENT POLICIES





Attendance Management Policies

- The higher employees are in the management hierarchy, statistically, the fewer days they are absent from work
- With the end of mandatory retirement, we can expect to see greater numbers of workplace absences and increasing serious illnesses within our working population
- Attendance management is concerned with tracking and avoidance of these absences

What time off for illness are employers required to provide?

- In Ontario, provincially regulated employers with more than 50 employees are required to provide
 - up to 10 personal emergency days per year under the Employment Standards Act, 2000 (“ESA”)
- The Ontario Human Rights Commission (“OHRC”) requires accommodation of those who are disabled
- There are no other legal requirements in the area

What employers don't need to do

- Employers are not required to provide paid sick days
- Technically, you are not required to provide time off if an employee is too sick to work and the sickness is not a disability under the OHRC
 - Although this is a poor HR practice and not generally done

Policies – What to say

- Absences are to be reported
 - identify to whom reports are to be made
- Absences are to be recorded
- Establish if there are to be paid sick days provided
 - if so, how many?
 - also determine if you intend to reduce pay thereafter and inform employees of this policy
 - Can partial days be used or full days only?

Policies – What to say (con't)

- can sick days be used for medical appointments?
- can sick days be used to care for a sick family member?
- Maintain the right to request a medical note at any time irrespective of number of days the employee has been off sick

Policies – What to say (con't)

- Should stress the importance of regular attendance in the workplace
 - emphasize that failure to adhere to this expectation may constitute grounds for termination with cause

Sick days and the disabled employee

- Disability under the OHRC is defined to include:
 - any degree of physical disability or infirmity caused by injury, birth defect or illness
 - it includes past disabilities or perceived disabilities

Sick days and the disabled employee (con't)

- Payment for days off is not required - accommodation is
 - case-by-case basis
 - threshold undue hardship
- Regular attendance is something employers have a right to enforce and it is reasonable to insist on a doctor's note to substantiate any illness

DOCTORS' NOTES



Doctors' Notes

- Employers have a right to request them
- Supreme Court of Canada decision of *Honda v. Keays*

Doctors' Notes (con't)

- *Honda v. Keays* – SCC 2008
 - endorsed the employer's right to:
 - ask for doctors' notes
 - challenge notes when they were lacking in substance and were “self-reporting” and/or “cryptic” in nature
 - suggested employers will be entitled to their own Dr.'s medical opinions to obtain additional information when the duty to accommodate is invoked even if the medical information later proves to be incorrect
 - provided there is no:
 - » conspiracy
 - » ulterior motive
 - » bad faith

Doctors' Notes and Honda v. Keays (con't)

- found there to be no impropriety on the employer insisting on dealing directly with the employee, as opposed to through his counsel while employee on sick leave

Doctors' Notes and Honda v. Keays (con't)

- par 71
 - “...the main allegation was that Honda discriminated by requiring Keays to bring in a doctor’s note to justify each absence when employees with “mainstream illness” did not have to do so. The trial judge also found that this requirement had the effect of lengthening absences, ignoring the evidence of Ms. Selby who testified that Honda did not require the employee to produce a doctor’s note as precondition to returning to work.

Honda v. Keays

(Par 71 con't)

“As discussed earlier, employees outside the disability program did not require notes for absences of less than five days but were subject to discipline for excessive absences... whereas employees in the program were allowed regular absences without discipline beyond the usual attendance requirement under a system of supervision based on regular contracts with doctors. The program requires that medical notes be provided to establish that absences are in fact related to the disability. There is no stereotyping or arbitrariness here....”

Honda v. Keays

(Par 71 con't)

In addition, I accept that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.”

Dr. Notes – Do's and Don'ts

Do's

- **Do** ask whether the employee is suffering from a medical condition which renders them incapable of attending at work and performing their job
- **Do** ask whether there is an estimated date of return to work

Don'ts

- **Do not** request the diagnosis
- **Do not** ask for any more information than is reasonably required
- **Do not** contact the doctor directly – request the employee obtain whatever you require

Dr. Notes – Do's and Don'ts (con't)

Do's

- When the employee is fit to return to work **do** ask if any job modification is required
 - And whether it is temporary or permanent
- **Do** offer to pay for the report/letter

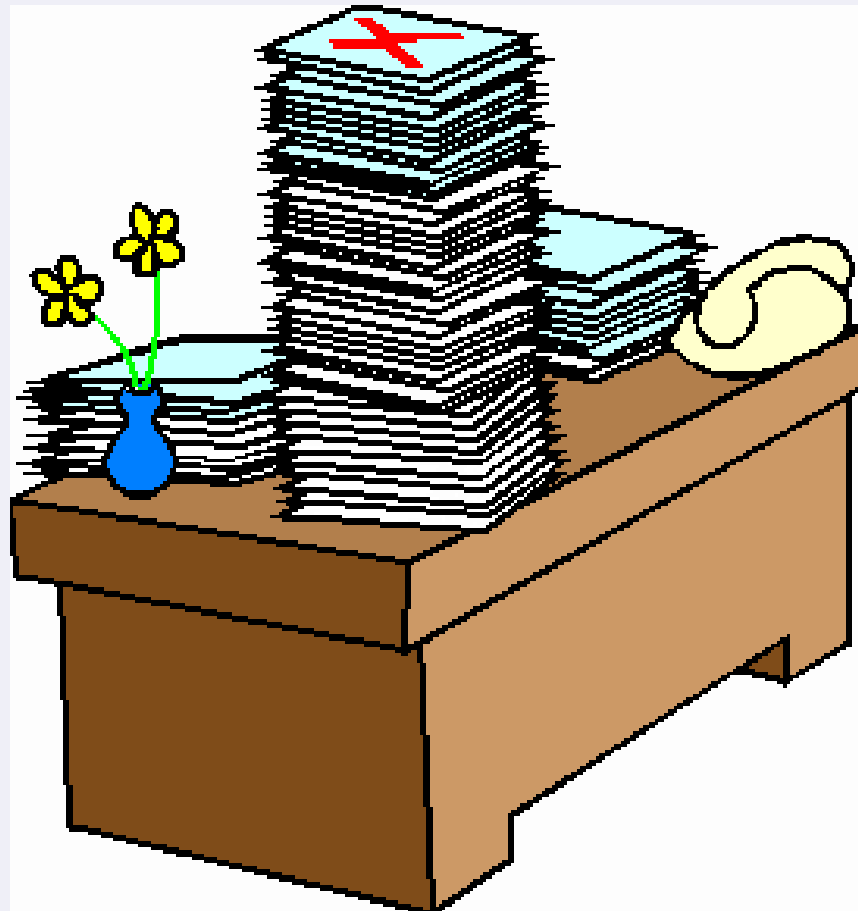
Don'ts

- **Do not** forget to reduce your request to writing to avoid ambiguity

Doctors' Notes – Independent medical reports

- Should only be requested in extenuating circumstances
 - such as: Where there is good reason to believe the doctor is not acting in good faith
 - note that this is unrelated to an insurer's right to request an independent medical examination as a precondition to payment under a policy of insurance

Chronic Absenteeism



What to do when there are too many absences?

- Rely on your tracking - watch the statistics
- Document!
 - keep track of the number of absences taken that year, or that quarter (as may be appropriate)
 - warn the employee that an improvement in attendance is required
 - demand a doctor's note to substantiate all further absences
 - the letter should not be disciplinary in nature and should recognize that the absences are not the fault of the employee
 - Identify any legitimate problem created by the absences and problems for accommodation going forward
 - suggest STD claim if reasonable

What to do when there are too many absences (con't)

- If not genuine – termination can be justified
- If related to illness, accommodation is required even when absences are numerous
 - accommodation may include tolerating a long term absence from work

What to do when there are too many absences (con't)

- Absenteeism due to illness or injury does not give rise to cause for termination as a matter of common law or statute
 - instead frustration of contract must be found

Chronic Absenteeism and the Hydro Quebec case

- This was the case in another high profile SCC decision in 2008 – *Hydro Quebec v. Syndicate des employees*
 - The employee was absent from work 3 years out of 7.5 that he was employed as a result of serious mental illness

Chronic Absenteeism and the Hydro Quebec case

- The Court held:
 - a fundamental change in working conditions is not required and it need not be impossible to accommodate the employee
 - accommodation does not modify the fundamental character of the employment relationship, namely the provision of services for remuneration. The employee still needs to be able to perform services

Chronic Absenteeism and the Hydro Quebec case (con't)

- the correct approach continues to be assessing undue hardship and to apply the contextual approach at the start of the absences
- the correct time to assess undue hardship is when the decision is being made (i.e. no application of hindsight)

Chronic Absenteeism and the Hydro Quebec case (con't)

- Contextual Approach
 - “permanently incapacitated” and unable to return to work to perform regular duties contemplated by the employment contract onus is on the employer
 - “permanently disabled” – when the employee will not be returning to work
 - still need to pay severance pay under the ESA
 - CL notice is not required

Chronic Absenteeism and the Hydro Quebec case (con't)

- Factors in contextual approach
 - length of service
 - nature of employment
 - how integral the employee is to the success of the employer's business
 - whether prolonged absence will be harmful to the employer
 - nature of the illness and prognosis for return to work

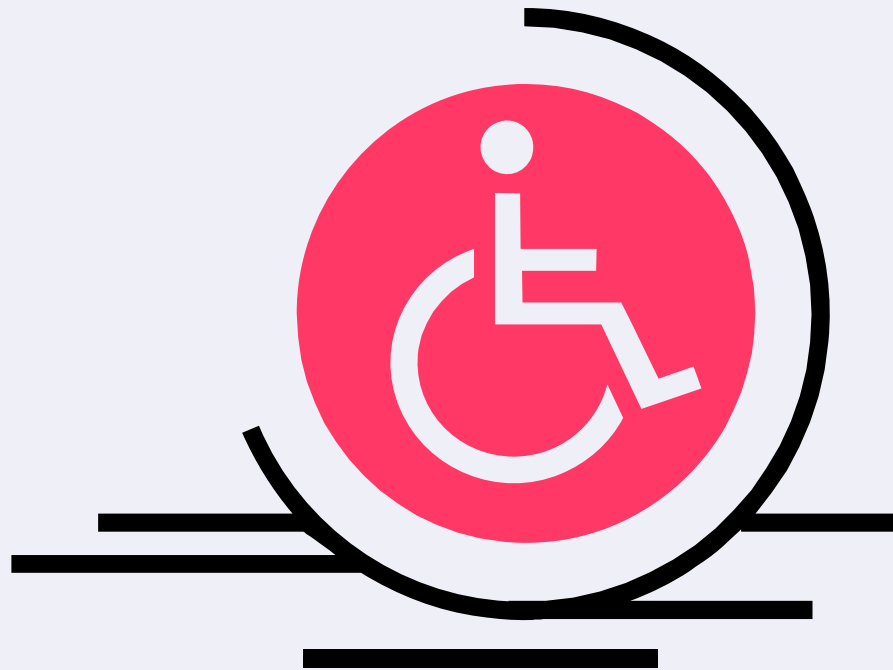
Chronic Absenteeism and the Hydro Quebec case (con't)

- terms of the employment contract including whether or not there is provision for STD and/or LTD insurance and number of sick days
- if there is a LTD claim made by the ill employee, then courts have held a lengthy absence to have been contemplated by the employment contract and frustration only occurs when it is clear that the employee will never be able to return to work

Chronic Absenteeism and Hydro Quebec case (con't)

- Accommodation includes arranging the workplace or duties to enable the employee to work
 - it may include:
 - a variable schedule
 - lighter duties
 - staff transfers
 - to ensure the employee can do his or her work
- in the case of chronic absenteeism, the threshold may be met if the employee is unable to resume his or her work in the reasonably foreseeable future as in Hydro Quebec – applying the contextual approach

DISABILITY AND ACCOMMODATION



What is Discrimination?

- The Ontario Human Rights Code provides for protection from discrimination in employment (or contract) on certain prescribed grounds:
 - 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability

Discrimination—What if you need to?

- If discrimination is alleged, the employee need only show a *prima facie* case
- The onus then shifts to the employer to show that it meets one of the permitted exceptions:
 - was for a purpose rationally connected to the performance of the job
 - was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose
 - is reasonably necessary to accomplish the work-related purpose
- this is known as the Meiorin test

Discrimination

- If you can not justify the discrimination, you can not utilize the policy, criteria or practice
- The next step is to consider whether the person can fulfill the position, notwithstanding their characteristics and if disabled, whether they can with necessary accommodation

Accommodation

OHRC

Disability

- 17. (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.

Accommodation

- (2) No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person can not be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

Accommodation

- Duty to accommodate
 - onerous one
 - “undue hardship”

- This applies whether the employee was disabled when he/she was hired or became disabled at some point in time during employment

Accommodation (con't)

- For an employer to demonstrate undue hardship requires objective and quantifiable evidence such as:
 - excessive financial costs
 - inadequate outside sources of funding
 - too intrusive on health and safety of others

Accommodation (con't)

- Employers have many obligations in the accommodation process:
 - accept requests for accommodation in good faith
 - request only information that is required to make the accommodation
 - obtain expert advice or opinion where necessary
 - take an active role, examine many possible solutions
 - co-operate with employee's representative (lawyer? union?)
 - maintain the confidentiality of persons with disabilities (need to know basis)
 - be timely
 - pay for required medical information or documentation

Accommodation (con't)

- The employer needs to be sensitive to a certain extent to the accommodation required and can not be wilfully blind to the employee's needs for such accommodation

Accommodation (con't)

- The employee has obligations in the process too:
 - request accommodation: say what's needed and why
 - co-operate in obtaining information, including necessary medical or other expert opinions
 - participate in discussions about solutions. Work with the employer to manage his or her own accommodation process
 - accept reasonable accommodation. Employee can not insist on “perfect” accommodation

Accommodation (con't)

- Without specific facts, much of an employer's obligation with respect to accommodation are "grey". The law is practically settled that accommodation does not require an employer to:
 - create a new position
 - pay an employee who is off sick
 - pay full time salary to someone capable of only working part-time, nor
 - pay outside the pay scale for the job the employee is actually performing

Medical Leaves and Return to Work Strategy

- Requires planning from the beginning of the leave
 - assume the person will return
 - arrange coverage accordingly
 - ensure that the employee believes that their position will remain open for them upon readiness to return to work
 - keep position temporarily staffed pending return of the employee
 - ensure information is provided to enable the employee to apply for STD or LTD or alternately ROE is forthcoming if the employee wishes to apply for public benefits

Medical Leaves and Return to Work Strategy (con't)

- Communication throughout leave
 - keep apprised of return to work date
 - without harassing the employee
 - up to date medical opinion as to return is usually reasonable

Medical Leaves and Return to Work Strategy (con't)

- Return to work notification
 - insurer may assist with the plan for return to work and reintegration
 - if there is no insurer then the employee must work this out with the employee and the attending physician

Medical Leaves and Return to Work Strategy (con't)

- Communicate with the employee about the need for a plan
 - may request medical note in order to substantiate that employee is fit to return to work
 - Develop a plan which addresses the accommodation needs of the employee

Hot Topics in Accommodation

- Drug and alcohol addiction
- Gambling addiction
- Mental disabilities
- Workplace Stress
- Religious Beliefs

Drug and Alcohol Addictions

- Both are disabilities requiring accommodation
- What about functioning alcoholics?
- What about drinking on the job?

Gambling Additions

- What about the employee who steals?
- What about the employee who does not advise of the need for accommodation?
- What about the employee who gambles at work on the internet or phone?

Mental Disabilities

- What is the employer's role in identification?
- What if the employee poses a risk to others?

Workplace Stress

- The duty to accommodate still exists
 - a type of mental disability protected ground under the OHRC

Workplace Stress (con't)

- HRInfoDesk reports the following causes of workplace stress:
 - #1 – high demand job and low control over the situation
 - personality conflicts
 - unreasonably long hours, too much or too little work
 - Threats to safety
 - role ambiguity or conflict
 - job insecurity
 - and a series of related issues [\[i\]](#)
 - the duty is also undue hardship

[\[i\]](#) hrinfodesk.com “Workplace Stress and job performance” by Christina Catenacci and Yosie Saint Cyr, Canadian Payroll and Employment Law News, February 2008

Workplace Stress (con't)

- Need to address the cause in order to permit the employee to return to work
 - may be new reporting structure
 - new office
 - scheduled time to allow employee to have a break from work to eat with medication
- There is no question that mental health issues attract accommodation requirements or employers are exposed to awards of damages
 - for example: Adga v. Lane

Religious Beliefs

- Days off?
- Time for prayer?
- Religious wear?

DEALING WITH THE AGING WORKFORCE



The Challenge of the Aging Workforce

- A growing issue
- The removal of mandatory retirement in provincially regulated industries has created a problem that is not going to diminish

The Challenge of the Aging Workforce (con't)

- Performance will weaken and many will not know it is happening
 - the old escape of retiring someone is no longer available
 - you can not implement other “across the board” determinations as to when someone must leave your workplace
- Downsizing can not target those who are older
 - conduct statistical review of impact of your downsizing

The Aging Workforce (con't)

- Mandatory retirement policies will be subject to scrutiny
 - will need to show a bona fide occupational requirement
 - VERY DIFFICULT

The Aging Workforce (con't)

- To justify it, such a policy will require:
 - the age requirement must be for a purpose rationally connected to the job
 - the requirement must have been adopted in good faith, with a sincere belief that the requirement is necessary for a legitimate work-related purpose;
 - the requirement must be objectively necessary for the carrying out of the work; and,
 - it must be impossible to accommodate the employee without imposing undue hardship on the employer.
- It is difficult to imagine how this test could be met

The Aging Workforce (con't)

- Results:
 - performance reviews needed for those with lengthy service and thus used for all of the organization
 - an employer can not have an assumption in planning as to when someone will retire
 - “til death do us part” attitude
- Options:
 - incentives through creation of pension plans
 - termination without cause
 - termination with cause
- Start planning financially and HR-wise now

THE DECISION TO DISMISS



Termination

- You can not terminate someone because of illness
- Alternatives need to be considered
 - performance improvement initiatives
 - coaching
- Review policies and contracts to see the cost of the termination likely to be incurred

Termination for Lateness

- Termination for occasional lateness will need to be without cause
- Termination for chronic lateness may be possible if properly documented and if the employee is provided with the opportunity to rectify the problem
 - will be easier if the lateness interferes with operations (i.e. receptionist, store manager)

Termination for Lateness (con't)

- Requires:
 - warning of lateness and consequences of failure to be on time – up to and including termination
 - consistent treatment of all employees and of that employee so there is no question in the employee's mind that tardiness is putting his or her job in jeopardy
 - the lateness must be unrelated to any disability

Termination for Chronic Absenteeism

- Consider whether the employee is absent culpably (without cause) or innocently (illness, etc.)
- If culpably absent
 - can dismiss possibly with cause if documented appropriately
- If innocently absent
 - consider the accommodation and whether that test can be met

Payments on Termination

- ESA payments
 - any employee terminated without cause
 - including those on LTD
- Common law entitlements
 - assessment based upon contextual approach as to whether or not the employment contract is frustrated

Termination and the Employee on Sick Leave

- Typically not recommended to terminate an employee who is on LTD
 - Note: Employers are not typically required to continue the benefits for employees who are absent a long period of time
 - termination of benefits not generally discriminatory
 - consider the costs of continuing relative to the risk

Termination and the Employee on Sick Leave (con't)

- If you intend to terminate an employee who is on sick leave or following return from sick leave
 - be prepared to substantiate that position
 - or the assumption will be that there was a termination because the employee was sick (OHRC violation)

Termination of the Employee on Sick Leave (con't)

- Termination of someone on sick leave can have unintended consequences to the employee
 - if employee is receiving Employment Insurance Sickness Benefits – receipt payment from the employer will operate to clawback those benefits
 - may clawback LTD also - will depend upon the insurance policy

Termination of the Employee on Sick Leave (con't)

- Caution is required if terminating someone who may qualify for STD or LTD but has not yet met the time for the application
 - continue their benefits
 - ensure the right to apply is not adversely impacted
 - call your insurer to seek appropriate confirmations

Termination of the Employee on Sick Leave (con't)

- *Egan v. Alcatel Canada Inc.* (200) 47 CCEL (3d) 87 (Ont. CA).
 - employer was liable for the loss by the employee of her LTD coverage when the employee became disabled during the common law notice period
 - responsible for the value of benefits that would otherwise have been payable held the Court

Termination of the Employee on Sick Leave (con't)

- ESA 2000 requires benefits continue during the statutory notice period
- Claim for lost LTD/STD extends throughout the entire common law notice period
 - you do not want to end up standing in the shoes of the insurer for failure to continue those benefits
- Consider how long they can be extended for
 - if ESA only, can you continue the employee on salary continuance and benefit continuance as a way of extending the coverage?

Termination of the Employee on Sick Leave (con't)

- this decision has in fact led many employers to no longer carry LTD insurance for their staff
- can make it very important to obtain a release which should include express mention of release of any claim for benefits including disability insurance or any claim thereunder

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